Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1995

GEORGE E. PATAKI, Governor of the State of New York, PHILLIP COOMBE, Acting Commissioner of New York State Department of Correctional Services,

Petitioners,

—against—

THEODORE BAKER, RAYMOND STRAWDER, RICHARD JACKSON, YOHANNES JACKSON, MARK A. SIMON, MALCOLM NELSON, MILTON GOODMAN, ANTHONY CANADY, TYRONE SANCHEZ and RICHARD JACKSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Voting Rights Act requires the states to allow incarcerated felons to vote, where that Act enforces the protections of the Fourteenth and Fifteenth Amendments to the United States Constitution and those Amendments explicitly grant the States the right to disenfranchise felons.

2. Whether the Voting Rights Act requires the states to allow incarcerated felons to vote, where such an interpretation of the Act would dramatically infringe the states' well established right to determine the "qualifications of their own voters" and where there is no "plain statement" in the Act or its legislative history suggesting that Congress intended the Act to have such revolutionary scope.

LIST OF PARTIES

The following parties were defendants-appellees in the court below: George E. Pataki, Governor of the State of New York, and Phillip Coombe, Acting Commissioner of the New York State Department of Correctional Services.[1] Both defendants-appellees are petitioners here. The following parties were plaintiffs-appellants in the court below: Milton Goodman, Anthony Canady, Tyrone Sanchez and Richard Jackson. All of these plaintiffs-appellants are respondents here. The following parties were plaintiffs in the district court but did not appeal from the decision dismissing their claims: Theodore Baker, Raymond Strawder, Richard Jackson, Yohannes Jackson, Mark A. Simon and Malcolm Nelson. The court of appeals reinstated the claims of plaintiffs as well as plaintiffs-appellants and all of these plaintiffs are respondents here.

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[1] At the time the action was commenced, Mario Cuomo was Governor of the State of New York and Thomas A. Coughlin was Commissioner of the New York State Department of Correctional Services. They were succeeded by the parties listed above. *See* Fed. R. Civ. P. 25(d)(1).

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IN THE

Supreme Court of the United States

OCTOBER TERM 1995

No. 95-____

GEORGE E. PATAKI, Governor of the State of New York, PHILLIP COOMBE, Acting Commissioner of New York State Department of Correctional Services,

Petitioners,

—against—

THEODORE BAKER, RAYMOND STRAWDER, RICHARD JACKSON, YOHANNES JACKSON, MARK A. SIMON, MALCOLM NELSON, MILTON GOODMAN, ANTHONY CANADY, TYRONE SANCHEZ and RICHARD JACKSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals reversing the district court's dismissal of this action is reported at 58 F.3d 814 (2d

Cir. 1995) and is reproduced in the appendix at 5-27a. The opinion of the court of appeals denying the petition for rehearing is reported at __ F.3d __ (2d Cir. 1995) and is reproduced in the appendix at 1-4a. The memorandum and order of the district court dismissing this action is reported at 824 F. Supp. 718 (S.D.N.Y. 1993) and is reproduced in the appendix at 28-38a.

JURISDICTION

The judgment of the court of appeals reversing the district court's dismissal of this action was entered May 12, 1995 and the opinion denying the petition for rehearing was filed June 19, 1995. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the Fourteenth Amendment to the Constitution of the United States, Section 2 of the federal Voting Rights Act, 42 U.S.C. § 1973, and New York State Election Law § 5-106(2). The texts of these provisions are reproduced in the appendix at 39-42a.

STATEMENT OF THE CASE

This case challenges the states' well established right to control the form and composition of their own governments and, specifically, their right to preclude incarcerated felons from voting. By law, the State of New York prohibits prison inmates from voting in any election. *See* New York Election Law § 5-106. In September, 1993, respondents commenced several actions (now consolidated), alleging that this prohibition violated their rights under the Fourteenth Amendment, Fifteenth Amendment and Voting Rights Act. (6-8a). With

respect to the Voting Rights Act, respondents raised, *inter alia*, two claims: (1) that because New York's prison population is disproportionately minority, denying prisoners the right to vote falls more heavily on minorities and thereby violates Section 2 of the Voting Rights Act (42 U.S.C. § 1973); and (2) that minorities who are not incarcerated have their vote "diluted" by this reduction in minority voting strength, also in violation of Section 2. (25-27a).

In December 1993, before petitioners had answered any of the complaints, the district court issued a "thoughtful memorandum opinion" consolidating the actions and suggesting that *sua sponte* dismissal of the action, as a matter of law, might be appropriate. (9-10a). The district court, however, granted respondents an opportunity to respond to the various legal concerns outlined in its opinion. *Id.* Respondents made further submissions, and, in a subsequent Order, the district court dismissed respondents' complaints *sua sponte*. (13a).

Respondents appealed, and on May 12, 1995, the court of appeals reversed the district court and reinstated the complaints. At the outset, the Second Circuit held that the district court improperly dismissed the claims *sua sponte*. (14-15a). However, the court went on to consider the merits of the respondents' two Voting Rights Act claims. The court determined that the Voting Rights Act does apply to incarcerated felons and therefore, as a matter of law, respondents' claims stated causes of action and were "sufficient to survive Rule 12(b)(6) dismissal." (25, 26-27a). The court then remanded the case to the district court for further proceedings. (27a).

Petitioners sought rehearing and rehearing in banc, arguing that the Voting Rights Act does not speak to the issue of prisoner enfranchisement and cannot be read to require the states to allow incarcerated felons to vote. (3a). On June 19, 1995, the court of appeals, in a written opinion, denied the petition for rehearing. (1a).[2] In its opinion, the court explicitly

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[2] The decision on petitioners' request for in banc review is pending.

rejected the arguments presented by petitioners and affirmatively stated that the Voting Rights Act can be read to encompass respondents' claims. (1-4a).

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision will have significant public policy ramifications: 47 states presently disenfranchise prison inmates,[3] reflecting a widespread determination

> that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. . . . A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.

Green v. Board of Elections of City of New York, 380 F.2d 445, 451-52 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968). Indeed, if the decision below stands, and inmates are permitted to vote in the local elections of the towns in which they are incarcerated, in some of those locales the inmates will constitute a voting majority. The inmates, in short, could have electoral control of these localities.[4]

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[3] Shapiro, *Challenging Criminal Disenfranchisement*, 103 Yale Law Journal 537, 553 n. 15-16 (1993) (and statutes cited therein).

[4] For example, the Town of Dannemora in upstate New York has slightly less than 1,300 registered voters. However, approximately 2,800 inmates are housed at Clinton Correctional Facility, which is located in Dannemora. New York State's Constitution requires that persons confined to a variety of institutions, including prisons, not use that institution as a residence for purposes of voting. *See* N.Y. Const. Art. 2, § 4. However, under the panel's logic, this provision might also be voided on the ground that it unfairly splinters or dilutes the voting power of prisoners located at Clinton.

Beyond these public policy concerns, the court of appeals' decision raises important federal statutory issues because it misinterprets the Voting Rights Act, vastly expanding its scope beyond boundaries set by this Court. This establishes a compelling need for review to consider the broad implications of expansion of the application of the Voting Rights Act to penal institutions. Moreover, this decision merits review by this Court because it is in conflict with the decisions of the Court of Appeals for the Sixth and Fifth Circuits, which held that the Voting Rights Act does not require the states to allow incarcerated felons to vote.

I

THE SECOND CIRCUIT'S DECISION RAISES IMPORTANT FEDERAL STATUTORY ISSUES BECAUSE IT MISINTERPRETS THE VOTING RIGHTS ACT AND VASTLY EXPANDS THE SCOPE OF THAT ACT BEYOND BOUNDARIES SET BY THIS COURT

The Second Circuit's decision applying the Voting Rights Act to prisoner enfranchisement misinterprets the scope of that Act. For the reasons discussed below, such an interpretation is incorrect and contrary to the holdings of this Court. Moreover, this erroneous interpretation has significant implications for the 47 states which currently, as a matter of appropriate public policy, refuse to grant the franchise to prison inmates. (*See*, p. 4, n. 3. *supra*). As such, the Second Circuit's decision merits review by this Court.

A. The Fourteenth Amendment To The United States Constitution Expressly Permits The States To Disenfranchise Convicted Felons, And The Voting Rights Act May Not Override This Constitutional Provision.

The Fourteenth Amendment to the United States Constitution expressly authorizes the individual states to deny the vote

to convicted felons. Congress may not, through the Voting Rights Act, override this constitutional provision. Thus, the Second Circuit's contrary interpretation of the Voting Rights Act is in error.

Section 2 of the Fourteenth Amendment to the United States Constitution states in part:

> Representatives shall be apportioned among the several States according to their respective numbers. . . . But when the right to vote . . . is denied . . . or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced [by a set proportion].

U.S. Const. Amend. XIV, § 2 (emphasis added). This Court, after careful analysis of the language and history of Section 2, has concluded that the above language provides an "affirmative sanction" on "the exclusion of felons from the vote." *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). As this Court explained:

> We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.

Id. See also Shepherd v. Trevino, 575 F.2d 1110, 1114 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979) (discussing *Richardson* and explaining that "*Section 2's express approval of the disenfranchisement of felons* thus grants to the states a realm of discretion in the disenfranchisement and reenfranchisement of felons which the states do not possess with respect to limiting the franchise of other citizens") (emphasis added).

Because the Constitution expressly gives states the right to deny the vote to felons, the Voting Rights Act may not be read to vitiate this constitutional grant of authority. *Marbury v. Madison*, 1 Cranch 137, 177 (1803). *See also Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) (*per* Black, J.) ("Congress may not by legislation repeal other provisions of the Constitution"). *Oregon* is particularly instructive in this regard. *Oregon* struck down that part of the Voting Rights Act which barred states from denying the vote, in local elections, to persons between 18 to 21 years of age. The Court, in a series of plurality opinions, found that this section of the Act was unconstitutional because it overrode the states' general constitutional authority to regulate their own elections. *Oregon*, 400 U.S. at 125.[5] The logic of *Oregon* applies even more strongly here. In *Oregon* the Court relied upon only a generalized right of the states to control elections; here, the Constitution explicitly grants the states a specific right to control prisoner enfranchisement.

The Second Circuit attempted to avoid the above argument through the following reasoning:

> Although section two of the Fourteenth Amendment permits states to disenfranchise felons . . . it does not permit the states . . . to intentionally disenfranchise black felons while permitting white felons to vote, *Hunter v. Underwood*, 471 U.S. 222, 225, 233 (1985), and Congress may enforce the constitutional provisions against such discrimination by applying the Voting Rights Act to prisoners, at least to the extent of prohibiting voting requirements that achieve discriminatory results.

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[5] Justice Black, announcing the decision for the Court, distinguished this part of the Act from the Act's bar on literacy tests—which had been upheld—on the ground that with literacy tests, there had been a detailed congressional finding that various states used the tests expressly to disenfranchise minorities. *Id.*, 400 U.S. at 129-33.

(3a). Such reasoning cannot survive careful scrutiny.[6] Normally, Congress may go beyond the Fourteenth and Fifteenth Amendments' protections against intentional discrimination to bar discriminatory results. However, Congress' authority is more limited in the unique area of prisoner enfranchisement, because "the exclusion of felons from the franchise has affirmative sanction in § 2 of the Fourteenth Amendment, a sanction which was not present in the case of . . . other restrictions on the franchise. . . ." *Richardson*, 418 U.S. at 54. *See also Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984) (acknowledging that the Fourteenth Amendment's grant of authority to the states makes this issue unique); *Allen v. Ellisor*, 664 F.2d 391, 395 (4th Cir.) (en banc), *rev'd on other grounds*, 454 U.S. 805 (1981) (*Richardson* "held expressly and unequivocally that the power of the states to disqualify for crime under § 2 of the Fourteenth Amendment was not subject to the equal protection constraints of § 1").

Ultimately, the Second Circuit's argument is reduced to the suggestion that the Voting Rights Act is enforcing the Civil War Amendments by overriding those same Amendments' explicit statement that the states may deny the vote to prisoners. Such a holding cannot be sustained. As Justice Black explained in *Oregon*, Congress "may only 'enforce' the provisions of the [Civil War] amendments and may do so only by 'appropriate legislation.' " *Id.*, 400 U.S. at 128. *See also South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (Congress, in enacting the Voting Rights Act, is limited by the scope of the Civil War Amendments). Here, the Voting Rights Act cannot "enforce" the Civil War Amendments by overriding them, and the Second Circuit erred in giving the Act such scope.

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[6] It also directly contradicts the court's own finding that the complaint in this action did *not* allege such a discriminatory intent. (21a).

B. Well Established Rules Of Constitutional And Statutory Interpretation Prohibit Applying The Voting Rights Act To Prisoner Enfranchisement.

Even beyond the Fourteenth Amendment's specific grant of authority to the states to decide issues of prisoner enfranchisement, well established rules of constitutional and statutory construction prohibit interpreting the Voting Rights Act as applying to this issue absent a "plain statement" from Congress of such intent. No such "plain statement" exists, and therefore the Second Circuit erred in finding that the Voting Rights Act applies to the case at bar.

The "plain statement" rule is rooted in considerations of federalism and the proper relationship between the federal government and the states. As this Court has frequently acknowledged, "our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Integral to the concept of dual sovereignty is the idea that the states enjoy a certain autonomy and institutional integrity, especially on questions of how to structure the state's own government. *Gregory*, 501 U.S. at 460. *See also Sugarman v. Dougall*, 413 U.S. 634, 641 (1973) (states enjoy the power "to preserve [their] basic conception of a political community") *quoting Dunn v. Blumstein*, 405 U.S. 330 (1972).[7]

When considering legislation which has the potential to upset this balance of power, it is well settled that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' " *Gregory*, 501 U.S. at 460-61, *quoting Will v. Michigan*, 491 U.S. 58, 65 (1989) and *Atascadero State Hos-*

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[7] Where Congress acts, as here, pursuant to its powers under the Civil War Amendments, its ability to intrude upon the state's sovereignty is enhanced. However, this Court has clearly explained that "the Fourteenth Amendment does not override all principles of federalism." *Gregory*, 501 U.S. at 469. *See also Sugarman*, 413 U.S. at 648.

pital v. Scanlon, 473 U.S. 234, 242 (1985). This "plain statement" rule of construction serves the important function of "assur[ing] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Will*, 491 U.S. at 65.[8]

In *Gregory*, this Court considered a challenge to the Missouri Constitution's requirement that all state judges must retire at age 70, where plaintiffs claimed that the requirement violated the federal Age Discrimination in Employment Act ("ADEA"). In the absence of a "plain statement" by Congress that it intended the ADEA to cover state judges, the Court declined to read the Act so broadly. As the Court explained, "Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers." *Gregory*, 501 U.S. at 460.

This Court's reasoning in *Gregory* applies equally to the Voting Rights Act. Interpreting the Voting Rights Act as dictating to the states on when they must allow incarcerated felons to vote presents a significant intrusion on the states' ability to define their "constitutional officers." *Gregory*, 501 U.S. at 460. *See also Sugarman*, 413 U.S. at 647 ("each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen"); *Oregon*, 400 U.S. at 126 ("[n]o function is more essential to the separate and independent existence of the States . . . than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county and municipal offices. . . .").

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[8] Again, while the Civil War Amendments curtail the states' sovereignty, they do not eliminate this sovereignty or reduce the need for a "plain statement" before infringing upon it. This Court emphasized this fact in *Gregory*, where it held that the "plain statement" rule would apply to the legislation in question in that case regardless of whether it was enacted pursuant to the commerce clause or the Fourteenth Amendment. *Id.*, 501 U.S. at 470.

Given the states' vital interest in controlling its electorate, the Voting Rights Act may not be read as interfering in this process absent a "plain statement" from Congress authorizing the intrusion. Nothing in the text, the legislative debate or the legislative history of the Act even suggests that Congress intended that it apply to prisoner enfranchisement.[9] The drastic consequences of allowing the Voting Rights Act to regulate the issue,[10] combined with the complete absence of any discussion of the subject in the Act's extensive legislative history, bolsters this conclusion. So too does Congress' enactment of the National Voter Registration Act of 1993 (42 U.S.C. § 1973gg) which explicitly makes provision for the states to disenfranchise felons. 42 U.S.C. § 1973gg-6(g). Indeed, even the Second Circuit was unable to find a "plain statement," relying instead upon the Act's general prohibition on "voting requirements that result in denial . . . of the right to vote on account of race." (3-4a). This general statement, of course, says nothing about the Act's application to the unique circumstance of prisoner enfranchisement and therefore is wholly inadequate to satisfy the "plain statement" requirement.

The Second Circuit's decision will vastly expand the scope of federal intrusion upon the State's ability to regulate its own government. Such a radical interpretation of the Voting Rights Act is in conflict with the precedents of this Court and other circuits and therefore merits review by this Court.

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[9] Even plaintiffs' counsel has written, in an article cited to the court below, that Congress "may not have foreseen challenges to criminal disenfranchisement based on [the Voting Rights Act]." Shapiro, *supra* at 553.

[10] Only three states do *not* deny the vote to convicted felons. Shapiro, *supra* at note 14.

II

THE SECOND CIRCUIT'S DECISION IS IN CONFLICT WITH DECISIONS OF THE SIXTH AND FIFTH CIRCUITS, WHICH HELD THAT THE VOTING RIGHTS ACT DOES NOT REQUIRE STATES TO ALLOW INCARCERATED FELONS TO VOTE

The Second Circuit's decision in this case is in direct conflict with the decision of the United States Court of Appeals for the Sixth Circuit, which held that the Voting Rights Act does not apply to prisoner enfranchisement, *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986), and an apparent conflict with decisions of the Fifth Circuit. *See United States v. Ward*, 352 F.2d 329 (5th Cir. 1965) (prisoner disenfranchisement not inconsistent with Voting Rights Act settlement decree); *Texas Supporters of Workers v. Strake*, 511 F. Supp. 149, 155 (S.D. Tex. 1981) (Voting Rights Act not applicable to prisoner enfranchisement).

In *Wesley*, the Sixth Circuit considered, at some length, the applicability of the Voting Rights Act to the enfranchisement of incarcerated felons. The court began its analysis by recognizing "the state's legitimate and compelling rationale for enacting the statute [barring convicted felons from voting]." *Wesley*, 791 F.2d at 1261. *Wesley* further observed that the bar on voting "does not deny any citizen, *ab initio*, the equal opportunity to participate in the political process and elect candidates of their choice. Rather, only the commission of a preascertained, proscribed act warrants the state . . . to foreclose a certain individual from the voting process. . . ." *Id.* at 1262. As such, the Court concluded that denying inmates the right to vote did not violate the Voting Rights Act because it did not "result" in loss of the vote on account of race or color. *Id.*

The Second Circuit's decision also appears to be inconsistent with the Fifth Circuit's decision in *United States v.*

Ward. In that case, the federal government brought suit under the Voting Rights Act to challenge certain election practices in Louisiana, including that state's requirement that voters demonstrate "good moral character." *Ward*, 352 F.2d at 330. The court upheld the federal government's position and adopted its proposed decree governing future conduct. *Id* at 330-331. However, the court explicitly created an exception to the decree's bar on "moral character" tests, allowing Louisiana to continue prohibiting felons from voting. *Id*. at 332. In creating this exception, the court explained that "[p]resumably the government recognized that Louisiana may exclude persons convicted of felonies" from the right to vote. *Id*. at 331 n.1.

Finally, the Second Circuit's decision also conflicts with the decisions of this Court, and many lower courts, which, without specifically considering the Voting Rights Act, have generally approved state statutes disenfranchising inmates. *See, e.g., Richardson*, 418 U.S. at 54; *Franklin v. Murphy*, 745 F.2d at 1231; *Shepherd v. Trevino*, 575 F.2d at 1115; *Green*, 380 F.2d at 451; *Wilson v. Goodwin*, 522 F. Supp. 1214, 1216 (E.D.N.C. 1981); *Thiess v. State Administrative Board of Election Laws*, 387 F. Supp. 1038, 1041 (D. Md. 1974); *Fincher v. Scott*, 352 F. Supp. 117, 118-19 (M.D.N.C. 1972) (three judge panel), *aff'd*, 411 U.S. 961 (1973); *Kronlund v. Honstein*, 327 F. Supp. 71, 73 (N.D. Ga. 1971); *Bailey v. Baronian*, 394 A.2d 1338, 1344 (R.I. 1978). Indeed, each of these cases upheld the states' interests in the disenfranchisement of inmates against challenges that the practice violated the Fourteenth Amendment, which Amendment provides much of the foundation for the Voting Rights Act itself.

Because the decision of the Second Circuit directly conflicts with the Sixth Circuit's decision in *Wesley*, as well as the Fifth Circuit's decision in *Ward*, and because it also conflicts with a vast body of decisional law supporting the states' right to deny the franchise to inmates, this Court should grant certiorari to review these decisions and ensure uniformity in the law.

CONCLUSION

FOR THE REASONS SET FORTH HEREIN, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
September 15, 1995

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 565, 1135, 1136, 1137—August Term 1994

Petition for rehearing filed: May 26, 1995

Decided: June 19, 1995

Docket Nos. 94-2163, -2164, -2165, -2176

THEODORE BAKER, RAYMOND STRAWDER, YOHANNES JACKSON, MARK A. SIMON and MALCOLM NELSON,

Plaintiffs,

MILTON GOODMAN, ANTHONY CANADY, TYRONE SANCHEZ and RICHARD JACKSON,

Plaintiffs-Appellants,

—against—

MARIO CUOMO, Governor of the State of New York, THOMAS A. COUGHLIN, Commissioner of New York State Department of Correctional Services,

Defendants-Appellees.

Before:

NEWMAN, *Chief Judge*,
FEINBERG and MESKILL, *Circuit Judges*.

MARK G. PETERS, New York, NY, Assistant Attorney General of the State of New York (Dennis C. Vacco, Attorney General of the State of New York, Victoria A. Graffeo, Solicitor General, Andrea Green, Deputy Solicitor General, Harvey Golubock, Deputy First Assistant Attorney General, of Counsel) *for Defendants-Appellees.*

On Petition for Rehearing

FEINBERG, Circuit Judge:

Defendants-appellees petition for rehearing of our decision in Baker v. Cuomo, No. 94-2163, slip op. 3999 (2d Cir. May 12, 1995), familiarity with which is assumed. In the challenged portion of that decision, we reversed a sua sponte ruling of the district court dismissing for failure to state a cause of action plaintiffs' claims for violations of the Voting Rights Act. We held that plaintiffs, black and hispanic incarcerated felons, who are disenfranchised pursuant to N.Y. Elec. Law § 5-106, had stated a cause of action under the Voting Rights Act, 42 U.S.C. § 1973.

In their petition for rehearing, defendants argue that permitting plaintiffs to obtain relief under the Voting Rights Act would violate § 2 of the Fourteenth Amendment, which provides that:

> Representatives shall be apportioned among the several States according to their respective numbers . . . . But when the right to vote [in certain elections] is denied . . . or in any way abridged, *except*

> *for participation in rebellion, or other crime*, the basis of representation therein shall be [proportionally] reduced . . . .

U.S. Const. Amend. XIV, § 2 (emphasis supplied). Defendants claim that our opinion determined "that the Voting Rights Act may be read to require states to enfranchise prisoners," and therefore conflicts with § 2 of the Fourteenth Amendment, which expressly authorizes states to disenfranchise prisoners. We do not agree that there is a conflict.

Although section two of the Fourteenth Amendment permits states to disenfranchise felons without proportionately diminishing the state's representation in Congress, it does not permit the states to pick and choose *among* felons in a way that violates whatever statutory protections of the right to vote Congress has enacted pursuant to its broad powers. Or, to put it another way, section two clearly does not authorize states to intentionally disenfranchise black felons while permitting white felons to vote, Hunter v. Underwood, 471 U.S. 222, 225, 233 (1985), and Congress may enforce the constitutional provisions against such discrimination by applying the Voting Rights Act to prisoners, at least to the extent of prohibiting voting requirements that achieve discriminatory results. See, e.g., Thornburg v. Gingles, 478 U.S. 30, 35 (1986); City of Rome v. United States, 446 U.S. 156, 175 (1980).

To the extent that this limitation changes the balance of power between the federal government and the states, we believe that Congress provided a clear statement of its intention to do so as required by Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991). See 42 U.S.C. § 1973, as amended (prohibiting voting requirements that result in

denial or abridgement of the right to vote on account of race).

Defendants' reliance on Oregon v. Mitchell, 400 U.S. 112 (1970) is also misplaced. In that case, the Supreme Court struck down a provision of the Voting Rights Act that purported to require states to establish an 18-year-old voting age for local elections. The Court determined that there was no factual foundation to support the notion that a 21-year-old vote requirement discriminated on the basis of race and that Congress had made no such legislative finding. Id. at 130. Thus, Justice Black stated, "Since Congress has attempted to invade an area preserved to the States by the Constitution *without a foundation for enforcing the Civil War Amendments' ban on racial discrimination*, I would hold that Congress has exceeded its powers." Id. (emphasis added). However, the court said nothing to indicate that Congress would be similarly limited if it *were* acting to enforce the Civil War Amendments, as it clearly was in adopting the "results test" of 42 U.S.C. § 1973.

Defendants raise several additional arguments in their petition, which were not raised in this court prior to our decision and which we do not decide in this petition for rehearing. However, because defendants have never filed a response to plaintiffs' action in the district court, they should be free on remand to move for Rule 12(b)(6) dismissal on any basis not already considered and ruled upon by this court. Contrary to defendants' contention, nothing in our opinion precluded them from so moving.

For the foregoing reasons, the petition for rehearing is denied.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 565, 1135, 1136, 1137—August Term 1994

Argued: December 15, 1994 Decided: May 12, 1995

Docket Nos. 94-2163, -2164, -2165, -2176

THEODORE BAKER, RAYMOND STRAWDER, YOHANNES JACKSON, MARK A. SIMON and MALCOLM NELSON,

Plaintiffs,

MILTON GOODMAN, ANTHONY CANADY, TYRONE SANCHEZ and RICHARD JACKSON,

Plaintiffs-Appellants,

—against—

MARIO CUOMO, Governor of the State of New York, THOMAS A. COUGHLIN, Commissioner of New York State Department of Correctional Services,

Defendants-Appellees.

Before:

NEWMAN, *Chief Judge*,
FEINBERG and MESKILL, *Circuit Judges*.

Plaintiffs, black and hispanic incarcerated felons, appeal from sua sponte dismissal of their claims brought under 42 U.S.C. § 1983, by the United States District Court for the Southern District of New York, Vincent L. Broderick, J. Plaintiffs claimed that N.Y. Elec. Law § 5-106 violated the Fourteenth and Fifteenth Amendments and the Voting Rights Act. The Court of Appeals, Feinberg, J., held that the decision of the district court is reversed and remanded.

ANDREW L. SHAPIRO, New Haven, CT, Yale Law School, (Brett Dignam, New Haven, CT, The Jerome N. Frank Legal Services Organization, of Counsel, on the brief), *for Plaintiffs-Appellants.*

LAURA M. NATH, New York, NY, Assistant Attorney General of the State of New York (G. Oliver Koppell, Attorney General of the State of New York, Frederic L. Lieberman, Assistant Attorney General, of Counsel, Patrick M. McGuirk, Student Intern), *for Defendants-Appellees.*

FEINBERG, Circuit Judge:

Plaintiffs-appellants are black and hispanic convicted felons held in a New York State prison. As incarcerated felons, they are denied the right to vote under § 5-106 of New York State's Election Law (§ 5-106) even though other felons, who are not incarcerated, may exercise that

right. Plaintiffs challenged their disenfranchisement by filing pro se complaints in the United States District Court for the Southern District of New York alleging civil rights violations by defendants, then-Governor of New York State Mario Cuomo and Commissioner of New York State Department of Correctional Services Thomas A. Coughlin. In particular, plaintiffs claimed that because of the racial composition of the state prison population and because of racially discriminatory sentencing in the state criminal justice system, defendants' enforcement of § 5-106 violated § 2 of the Voting Rights Act as well as the Fourteenth and Fifteenth Amendments of the United States Constitution.

The district court, Vincent L. Broderick, J., dismissed plaintiffs' complaints sua sponte pursuant to Fed.R.Civ.P. 12(b)(6). We reverse and remand for further proceedings.

I. Background

In September 1993, nine black and hispanic New York State prisoners, proceeding in forma pauperis and invoking 42 U.S.C. § 1983, filed substantially identical pro se complaints in the district court, on behalf of themselves and all individuals similarly situated, alleging violations of their federal civil rights. In particular, they alleged that defendants deprived them of their right to vote by enforcing § 5-106. That section provides, in relevant part:

> Qualifications of voters; reasons for exclusion
>
> * * *
>
> 2. No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he

shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole. The governor, however, may attach as a condition to any such pardon a provision that any such person shall not have the right of suffrage until it shall have been separately restored to him.

3. No person who has been convicted in a federal court, of a felony, or a crime or offense which would constitute a felony under the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the president of the United States, or his maximum sentence of imprisonment has expired, or he has been discharged from parole.

4. No person who has been convicted in another state for a crime or offense which would constitute a felony under the laws of this state shall have the right to register for or vote at any election in this state unless he shall have been pardoned or restored to the rights of citizenship by the governor or other appropriate authority of such other state, or his maximum sentence has expired, or he has been discharged from parole.

5. *The provisions of subdivisions two, three and four of this section shall not apply if the person so convicted is not sentenced to either death or imprisonment, or if the execution of a sentence of imprisonment is suspended.*

* * *

N.Y. Elec. Law § 5-106 (McKinney) (emphasis supplied).

Each plaintiff further alleged that blacks and hispanics comprise a disproportionately high percentage of the New York State prison population and that defendants' enforcement of § 5-106 "deprives plaintiff of his right to vote and promotes racial discrimination in voting practices . . . [without a] compelling [state] interest."

Each plaintiff sought declaratory and injunctive relief, primarily requesting that the district court direct defendants "Cuomo and Coughlin to ensure and enable plaintiff and those similarly situated to vote in the November, 1993 New York City elections, and all future elections until a ruling is enter[ed] in this pending action[ ]." They also sought "nominal damages" of $1.50 per day if defendants did not enable them to vote.

Defendants never answered these complaints. While they were preparing to respond, the district court suggested that they instead await the outcome of the court's sua sponte action. Thereafter, in a memorandum opinion dated December 1993, the district court sua sponte consolidated the nine complaints and notified plaintiffs that unless they responded "to the considerations outlined" in its opinion, it would dismiss the claims under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief may be granted. Baker v. Cuomo, 842 F. Supp. 718, 723 (S.D.N.Y. 1993).

The district court's thoughtful memorandum opinion stated that this case "raises profound issues." Id. at 720. The court identified a number of potential legal bases for plaintiffs' claims, including violation of the Voting Rights Act and violation of the equal protection component of the Fourteenth Amendment. The court did not

mention the Fifteenth Amendment as a possible ground of recovery. In justifying dismissal, the court stated that the issues raised had been "examined by the judiciary with uniform negative outcomes," id. at 720, and added that "awaiting responses by the defendants would consume resources with little likelihood of benefit to plaintiffs." Id. However, the opinion invited this court to take a different view, noting that an appellate court might choose to grant the relief sought in light of "the importance of voting rights and the weakness of contrary imperatives." Id. at 721. The court then considered the specific causes of action it had identified.

Regarding the equal protection claim, the court stated, "Voting is a fundamental political right[.] Disenfranchisement of felons under state law, however, has been consistently upheld." Id. (citations omitted). The court went on to note that both the "Equal Protection Clause and the federal Voting Rights Act" protect "members of minority communities." But, the court pointed out, "political empowerment of those convicted of crime [might] . . . depriv[e] innocent citizens of the opportunity to guide the destiny of their municipalities or obtain representation at the county or state level." Id. at 720-21 (footnote omitted). In addressing the alleged Voting Rights Act violation, the court stated, "Disproportionate racial impact of felon disenfranchisement on a minority voting population does not establish a violation of the Voting Rights Act absent other reasons to find discrimination." Id. at 722.

The court gave plaintiffs 45 days to respond to its concerns and tolled defendants' time to move or answer pending the outcome of its sua sponte determination. The district court also denied a request by plaintiffs for appointment of counsel. Id. at 723. Finally, the court

declined to consider class certification because "all complaints will be dismissed unless cause to the contrary can be shown." Id. at 720 n.1.

In February 1994, four of the original plaintiffs, Milton Goodman, Richard Jackson, Tyrone Sanchez and Raymond Strawder, filed pro se amended complaints and supporting memoranda in response to the district court's order. These complaints were also substantially identical, although more detailed than the original complaints. The amended complaints clarified the bases of plaintiffs' claims for relief under § 1983 for violations of the Voting Rights Act, the Fourteenth Amendment and the Fifteenth Amendment.

The relevant factual contentions raised in the amended complaints were as follows:

> 10) Upon information and belief, Blacks and Latinos combined comprise approximately 22 percent of New York State's population.
>
> 11) Upon information and belief, Blacks and Latinos comprise 82 percent of New York State's prison population.
>
> 12) Upon information and belief, approximately 75 percent of New York State's prison population consists of persons from [14 state] assembly districts . . . , which are located in New York City.
>
> 13) In 1988, New York State's Chief Judge . . . commissioned a committee titled The New York State Judicial Commission On Minorities . . . to study the presence and effects of racism in the state's courts.

> 14) In April 1991, the [Commission] reported [in a "Report on Minorities"] that there was evidence of race-based disparity in the State Courts' conviction rate and sentence type . . . .
>
> * * *
>
> 21) Prior to the September 1993, New York City Primary, plaintiff informed defendant Cuomo that N.Y. Election law § 5-106 (5) violated the equal protection clause of the Federal and State Constitutions, and requested that Cuomo take action to ensure plaintiff's right to vote in the upcoming City-wide Primary and Election.
>
> 22) In response to plaintiff['s] request, defendant Cuomo referred plaintiff's request to defendant Coughlin for disposition.
>
> 23) . . . Coughlin issued memoranda indicating that the law denying plaintiff the right to vote was constitutional and will be enforced as always . . . .

According to the Report on Minorities cited in the amended complaints, blacks and hispanics are more likely than whites to be imprisoned for commission of the same felony offense in New York State. See 2 Report of the New York State Judicial Commission on Minorities: The Public and the Courts 162-76 (1991). The Report on Minorities made an explicit finding that "[t]here is a perception, supported in several aspects by research findings, that there is a race-based disparity in the conviction rate and the sentence type." Id. at 176.

In a February 1994 order, without elaboration, the district court dismissed plaintiffs' complaints sua sponte. Four of the original plaintiffs, Anthony Canady, as well

as Goodman, Jackson and Sanchez, thereafter filed this appeal. As noted above, Goodman, Jackson and Sanchez had all filed amended complaints. Canady had not. Raymond Strawder, who filed an amended complaint, did not file a notice of appeal. In this court, defendants claim that they were never served with Jackson's complaint, and they have neither waived service of process nor defended the action as to him. Plaintiffs are represented by pro bono counsel on this appeal.

II. Discussion

A. Sua Sponte Rule 12(b)(6) Dismissal

We have previously stated that sua sponte dismissals without service of process and filing of a response by the opposing party are disfavored. See Bayron v. Trudeau, 702 F.2d 43, 45 (2d Cir. 1983); Moorish Science Temple of America, Inc. v. Smith, 693 F.2d 987, 990 (2d Cir. 1982). Rule 12(b)(6) dismissal is appropriate only where "it appears beyond doubt that . . . no set of facts" would permit recovery on the plaintiff's claims. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Further, the court must liberally construe the pro se complaint, Haines v. Kerner, 404 U.S. 519, 520 (1972), and the allegations therein "should be construed favorably to the pleader." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). A complaint should not be dismissed simply because a plaintiff is unlikely to succeed on the merits. Id. Rule 12(b)(6) dismissals are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development. Wright & Miller, 5A Federal Practice and Procedure: Civil 2d § 1357 at 341-43 (1990 & 1994 pocket part).

We do not suggest, however, that sua sponte dismissal is never appropriate. It is a useful device for disposing of frivolous or malicious in forma pauperis filings, see 28 U.S.C. § 1915(d); Perez v. Ortiz, 849 F.2d 793, 797 (2d Cir. 1988), or frivolous habeas corpus petitions. Id. It is also appropriate if it appears from the face of the complaint that the action is barred, for example by expiration of the statute of limitations. See Pino v. Ryan, 49 F.3d 51, 53-54 (2d Cir. 1995); Leonhard v. United States, 633 F.2d 599, 609 n.11 (1980), cert. denied, 451 U.S. 908 (1981). In *Pino*, we pointed out that although "we have frequently urged district judges to use caution in deciding whether to dismiss [pro se] complaints [pursuant to § 1915(d)] prior to service upon defendants and the filing of a motion or answer . . . caution need not lead to paralysis." Pino, 49 F.3d at 53.

Strictly speaking, this case is not governed by *Pino*, since the judge here apparently dismissed under Rule 12(b)(6) rather than § 1915(d). Nevertheless, a bit more caution would have been proper here. The complaints are not clearly precluded by a bar such as a statute of limitations. Nor are they facially frivolous or malicious. Moreover, the state attorney general's office, which represents defendants in this matter, acknowledged at oral argument before us that there is an absence of clear authority on the Voting Rights Act issues. Certainly with respect to that claim, it appears that this case raises novel and important legal issues that require more thorough consideration than a sua sponte dismissal pursuant to Rule 12(b)(6) filed without any response from defendants allows. Whatever we may think of appellants' chances of success on the merits, it is clearly not beyond doubt that recovery on the statutory claim would be precluded under any set of facts. Accordingly, we reverse

the order of dismissal and remand this case to the district court. On remand, it would be appropriate to appoint counsel, as plaintiffs requested in the district court, to represent plaintiffs. We assume that pro bono counsel on appeal, The Jerome N. Frank Legal Services Organization, which has done an excellent job in this court, would be the logical candidate for such appointment. Because plaintiffs were without counsel in the district court and because further proceedings will be necessary, we believe it appropriate to offer some guidance to the district court.

B. Proceedings on Remand

All three of plaintiffs' causes of action in the amended complaints were premised on allegations that by enforcing § 5-106, defendants had deprived plaintiffs of their federal rights in violation of 42 U.S.C. § 1983.

> By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

Gomez v. Toledo, 446 U.S. 635, 640 (1980). Defendants do not dispute that they were acting in their capacity as state officials by enforcing the incarcerated felon disenfranchisement statute, § 5-106. Therefore, the principal question is whether enforcement of that statute deprived plaintiffs of federal rights secured by the Fourteenth or Fifteenth Amendments or by the Voting Rights Act.

(1) *Fourteenth Amendment Equal Protection Claim*

The district court dismissed plaintiffs' claim that defendants violated the Equal Protection Clause apparently because it found that "[d]isenfranchisement of felons under state law . . . has been consistently upheld." Baker, 842 F. Supp. at 721 (citations omitted). The district court also cited section 2 of the Fourteenth Amendment, signalling the court's apparent conclusion that the framers of the Fourteenth Amendment recognized and implicitly accepted the contemporaneous state practice of disenfranchising citizens for participation in certain crimes. See Richardson v. Ramirez, 418 U.S. 24, 43 (1974).

On appeal, plaintiffs argue that § 5-106 should be subject to strict scrutiny because it deprives them of their fundamental right to vote and because they alleged intentional race discrimination. They maintain that dismissal was inappropriate because defendants never offered a compelling state interest to justify the statute. In addition, plaintiffs claim that the district court failed to liberally construe their amended complaints as raising a minimum rationality challenge to the classification as well.

(a) Appropriate level of scrutiny

In reviewing the constitutionality of a statute that deprives a subclass of felons of the right to vote but permits other felons to retain the franchise, a key preliminary issue is the appropriate level of equal protection scrutiny to be applied. This issue has been fully briefed in this court by counsel for both parties.

Although the right to vote is generally considered fundamental, in the absence of any allegation that a challenged classification was intended to discriminate on the basis of race or other suspect criteria, statutes that deny felons the right to vote are not subject to strict judicial scrutiny. Ramirez, 418 U.S. at 54-56; Owens v. Barnes, 711 F.2d 25, 27 (3d Cir.), cert. denied, 464 U.S. 963 (1983); Shepherd v. Trevino, 575 F.2d 1110, 1114-15 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979); see also Wesley, 791 F.2d at 1261; cf. Hunter v. Underwood, 471 U.S. 222, 232-33 (1985); Hobson v. Pow, 434 F. Supp. 362, 366 (N.D. Ala. 1977).

In *Ramirez*, the Supreme Court upheld California constitutional and statutory provisions that permanently disenfranchised all convicted felons (including those who had completed their sentences) unless the felon's right to vote had been restored by court order or executive pardon. The Court relied on § 2 of the Fourteenth Amendment. That provision states that the number of representatives allocated to each state "shall be reduced" if that state "denie[s] . . . or in any way abridge[s], . . . *except for participation in rebellion, or other crime*" the right of "male inhabitants of such State, being twenty-one years of age, and citizens of the United States" to vote in certain elections. U.S. Const. amend. XIV, § 2 (emphasis supplied). After examining the congressional debates leading to the passage of this provision and considering other evidence regarding the original understanding of the Framers, the Court noted that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment." 418 U.S. at 54. The Court then concluded that § 1 of the Fourteenth Amendment "could not have been meant to bar outright a form of disenfranchisement which was

expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement." Id. at 55. The Court therefore did not inquire into whether California had a " 'compelling state interest' to justify exclusion of ex-felons from the franchise." Id. at 54.

In *Owens*, the Third Circuit relied on *Ramirez* in upholding a Pennsylvania statute that, like the New York statute challenged in this case, disenfranchised incarcerated felons while permitting unincarcerated felons to vote. 711 F.2d at 26. The court held that because "the right of convicted felons to vote is not 'fundamental,' " the statute would not violate the Equal Protection Clause unless it were irrational, which it was not. Id. at 27-28; see also Shepherd, 575 F.2d at 1114-15.

We agree with the Third Circuit that the similar classification before us in § 5-106 is not irrational. *Owens* held the statute in that case constitutional despite "the state's inexplicable failure to provide in its brief any rationale for such distinction." 711 F.2d at 27. The court found that the statute was rationally related to policies underlying the penal system and upheld the district court's Rule 12(b)(6) dismissal of the claim. Id. at 28 (citations omitted). In commenting on this possible state interest, the court further observed:

> The state could rationally decide that one of the losses, in addition to the basic deprivation of liberty, to which a prisoner who is incarcerated should be subject is that of participation in the democratic process which governs those who are at liberty. At the same time, Pennsylvania could rationally determine that those convicted felons who had served their debt to society and had been released from

> prison or whose crimes were not serious enough to warrant incarceration in the first instance stand on a different footing from those felons who required incarceration, and should therefore be entitled to participate in the voting process.

Id.

This court has also ruled that felon disenfranchisement is reasonably related to social contract principles, penal considerations and the state's interest in ensuring that elections are free from fraud and corruption. See Green v. Board of Elections, 380 F.2d 445 (2d Cir. 1967) (Friendly, J.), cert. denied, 389 U.S. 1048 (1968).

> The early exclusion of felons from the franchise by many states could well have rested on Locke's concept, so influential at the time, that by entering into society every man "authorizes the society, or which is all one, the legislature thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due." A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact. On a less theoretical plane, it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. This is especially so when account is taken of the heavy incidence of recidivism and the prevalence of organized crime. A contention that the

> equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.

Id. at 451-52 (footnote omitted) (citation omitted). Although the statute at issue in *Green* did not distinguish, as § 5-106 does, between incarcerated and unincarcerated felons, the state has argued that the same justifications support the instant classification. Having held that these justifications are sufficiently related to disenfranchisement of felons generally, we cannot say that they are not reasonably related to disenfranchisement of those felons who commit crimes serious enough to warrant incarceration.

Plaintiffs rely on two principal cases, *Hunter v. Underwood* and *Hobson v. Pow*, both cited above, which invalidated state laws disenfranchising certain classes of felons, as support for their argument that strict scrutiny applies. However, these cases are distinguishable from this one. *Hunter* addressed a section of the Alabama state constitution that intentionally discriminated against blacks. 471 U.S. at 229-32. *Hobson* invalidated a different subsection of the same state constitutional provision, which disenfranchised "wife-beaters." 434 F. Supp. at 365. Such provisions were intended to prevent newly-enfranchised former slaves from voting. See Andrew L. Shapiro, Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy, 103 Yale L.J. 537, 541-42 (1993).[1] Moreover, the *Hobson* court found an independent basis for heightened scrutiny in the suspect gender classification on the face of the statute.

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[1] The author, a Yale Law School student, argued the instant case on behalf of appellants in this court.

Hobson, 434 F. Supp. at 365-67. In contrast, § 5-106 displays no suspect classification on its face.

Plaintiffs also claim that heightened scrutiny is justified because § 5-106 has a discriminatory purpose. Plaintiffs argue on appeal that their amended complaints did allege such a purpose, but we can discern no such allegation. Disparate impact alone is not sufficient to establish a Fourteenth Amendment violation. Hunter, 471 U.S. at 227-28. Since plaintiffs were without the benefit of counsel in the district court, they should not be precluded in the proceedings on remand from seeking to amend their complaints to include an adequately pleaded allegation of intentional discrimination.[2] We express no view on whether such an amendment would be justified or could be proved based upon the legislative history of the New York statute. See, e.g., 1909 N.Y. Laws ch. 22, § 175; 1949 N.Y. Laws ch. 100, § 152(2); 1971 N.Y. Laws ch. 310, § 1; 1973 N.Y. Laws ch. 679, § 1.

(2) *Fifteenth Amendment*

As with plaintiffs' Fourteenth Amendment claim, we are unable to find any claim of intentional discrimination "on account of race, color, or previous condition of servitude," to support appellants' Fifteenth Amendment claim. U.S. Const. amend. XV, § 1; see also City of Mobile v. Bolden, 446 U.S. 55, 62 (1980); Butts v. City of New York, 779 F.2d 141, 143-45 & n.1 (2d Cir. 1985), cert. denied, 478 U.S. 1021 (1986). The theory upon which plaintiffs seek relief is that defendants' enforce-

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[2] As discussed above, appellant Canady never filed an amended complaint. However, under the circumstances, this should not preclude him from joining the other appellants in filing an amended complaint on remand.

ment of § 5-106 resulted in vote denial or vote dilution on account of race. However, as with their Fourteenth Amendment claim, appellants should not be precluded from seeking to amend their complaint to adequately allege intentional discrimination on remand.

(3) *Voting Rights Act*

The Voting Rights Act, as amended in 1982, Pub. L. No. 89-110, 79 Stat. 437 (the Act) (codified as amended at 42 U.S.C. § 1973 et seq.), does not require a showing of intent in order to establish a violation. See S. Rep. No. 417, 97th Cong., 2d Sess. 28 (1982), reprinted in 1982 U.S.C.C.A.N. (vol. 2) 177, 205-06 (Senate Report accompanying the 1982 amendments) ("[T]he specific intent of this amendment is that the plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." (footnote omitted)). The 1982 amendments explicitly adopted a results-oriented test and a "totality of the circumstances" standard. Section 2 of the Act as amended provides, in relevant part,

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which *results* in a denial or abridgement of the right . . . to vote on account of race or color, or [membership in language minority group protected by the Act].
>
> (b) A violation . . . is established if, based on the *totality of the circumstances*, it is shown that the political processes leading to nomination or election in the State . . . are not equally open to participation by members of a class of citizens protected by

subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

* * *

42 U.S.C. § 1973 as amended (emphases added).

The Senate Report accompanying the 1982 amendments listed nine non-exclusive factors that may be considered in determining whether, under the totality of the circumstances, a scheme or practice results in a violation of the Act. These include but are not limited to:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education,

employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

[8] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

[9] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Senate Report accompanying the 1982 amendments at 206-07. In addition, whether a voting qualification "results" in a denial or abridgement of the right to vote may depend, at least in part, on how the newly imposed requirement changes the status quo. As the Supreme Court stated in Thornburg v. Gingles, 478 U.S. 30 (1986), "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Id. at 47.

Section 2 protects citizens in two ways. First, it prohibits the use of certain facially neutral voting qualifications that *deny* the vote to citizens who are dispro-

portionately members of minority groups. See Gingles, 478 U.S. at 43; Butts, 779 F.2d at 148. Second, § 2 protects minority groups against schemes, such as certain at-large voting systems, that *dilute* minority voting strength. See, e.g., Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969). The Senate Report factors are especially important in assessing vote dilution claims. See Senate Report accompanying the 1982 amendments at 203-07.

Plaintiffs' amended complaints pleaded both vote denial and vote dilution theories. As to the vote denial claim, plaintiffs alleged that § 5-106 interacts with racial discrimination in the New York State criminal justice system to result in denial of the right to vote on account of race. In addition, plaintiffs cited specific evidence of racially disparate treatment in sentencing, which affects enfranchisement. This pleading was sufficient to survive Rule 12(b)(6) dismissal. Whether plaintiffs are ultimately able to recover, however, will depend upon all of the circumstances, which may include the factors described in the Senate Report accompanying the 1982 amendments and other relevant considerations. Because the district court dismissed plaintiffs' claims without receiving evidence and without even a response from defendants, it could not determine whether the totality of the circumstances would reveal a Voting Rights Act violation. Cf. Hispanics for Fair and Equitable Reapportionment (H-FERA) v. Griffin, 958 F.2d 24, 25 (2d Cir. 1992) (reversing and remanding sua sponte summary judgment for defendants on plaintiffs' claim under the Act but explicitly declining to state whether a trial was required).

As to the vote dilution claim, sua sponte dismissal was also inappropriate. In *Gingles*, the Supreme Court

explained two of the bases of a vote dilution claim: "Dilution of racial minority group voting strength may be caused by dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." 478 U.S. at 46 n.11. Other practices, such as gerrymandering, instituting majority runoffs, changing elective posts to appointive and substituting at-large elections for election by single-member districts, may also result in vote dilution. Senate Report accompanying the 1982 amendments at 183.

What all of these practices have in common is that they diminish the capacity of properly registered voters to participate in the political process and to elect representatives of their choice. Plaintiffs' principal claim, however, is not that their votes have been rendered less effective by gerrymandering, run-offs, appointment of officials and the like. Rather, it is that they have no vote at all. Thus, they do not appear to have standing to raise a vote dilution claim on behalf of themselves as incarcerated felons.

Plaintiffs further contend, however, that the disproportionate effect of § 5-106 dilutes the voting strength of all minorities, including those law-abiding or otherwise unincarcerated minority citizens who are registered to vote. The amended complaints stated that § 5-106 results in vote dilution because "approximately 75 percent of New York State's prison population consists of persons from [14 state] assembly districts . . . , which are located in New York City." A black or hispanic voter from one of these assembly districts might well have standing to assert a cause of action for vote dilution. But in the absence of such a plaintiff, the present plaintiffs apparently claim that they are appropriate class repre-

sentatives of minority voters generally. However, the district court dismissed plaintiffs' claims without considering this issue. Plaintiffs should be permitted to raise it on remand.

For the reasons stated above, the decision of the district court is reversed and the case is remanded for further proceedings consistent with this opinion. If plaintiffs seek to amend their complaint, they should not be precluded from seeking to raise issues of Voting Rights Act § 5 pre-clearance raised at oral argument in this court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93-Civ-6839 (VLB)
93-Civ-8420 (VLB)
93-Civ-8421 (VLB)
93-Civ-8422 (VLB)
93-Civ-6823 (VLB)
93-Civ-8424 (VLB)
93-Civ-8425 (VLB)
93-Civ-8426 (VLB)
93-Civ-8427 (VLB)

Theodore BAKER and all individuals similarly situated,

Plaintiffs,

—v.—

Mario CUOMO, Governor of the State of New York and Thomas Coughlin, Commissioner of New York State Department of Correction Services,

Defendants.

Raymond STRAWDER and all individuals similarly situated,

Plaintiffs,

—v.—

Mario CUOMO, Governor of the State of New York and Thomas Coughlin, Commissioner of New York State Department of Correction Services,

Defendants.

Milton GOODMAN and all individuals similarly situated,

Plaintiffs,

—v.—

Mario CUOMO, Governor of the State of New York and Thomas Coughlin, Commissioner of New York State Department of Correction Services,

Defendants.

Anthony CANADY and all individuals similarly situated,

Plaintiffs,

—v.—

Mario CUOMO, Governor of the State of New York and Thomas Coughlin, Commissioner of New York State Department of Correction Services,

Defendants.

Richard JACKSON and all individuals similarly situated,

Plaintiffs,

—v.—

Mario CUOMO, Governor of the State of New York and Thomas Coughlin, Commissioner of New York State Department of Correction Services,

Defendants.

Yohannes JOHNSON and all individuals similarly situated,

Plaintiffs,

—v.—

Mario CUOMO, Governor of the State of New York and Thomas Coughlin, Commissioner of New York State Department of Correction Services,

Defendants.

Mark SIMON and all individuals similarly situated,

Plaintiffs,

—v.—

Mario CUOMO, Governor of the State of New York and Thomas Coughlin, Commissioner of New York State Department of Correction Services,

Defendants.

Tyrone SANCHEZ and all individuals similarly situated,

Plaintiffs,

—v.—

Mario CUOMO, Governor of the State of New York and Thomas Coughlin, Commissioner of New York State Department of Correction Services,

Defendants.

Malcolm NELSON and all individuals similarly situated,

Plaintiffs,

—v.—

Mario CUOMO, Governor of the State of New York and Thomas Coughlin, Commissioner of New York State Department of Correction Services,

Defendants.

MEMORANDUM ORDER

VINCENT L. BRODERICK, *District Judge*.

I

These nine identical actions are brought under 42 U.S.C. § 1983 by prisoners at the Green Haven Correctional Facility (collectively, "plaintiffs"). Each action alleges unconstitutional deprivation of the right to vote because of incarceration for a felony conviction. Plaintiffs seek monetary damages of $1.50 per day, as well as declaratory and injunctive relief.

The related cases in the caption of this memorandum order are consolidated under the following caption:[1]

> THEODORE BAKER, RAYMOND STRAWDER, MILTON GOODMAN, ANTHONY CANADY, RICHARD JACKSON, YOHANNES JOHNSON, MARK SIMON, TYRONE SANCHEZ, MALCOLM NELSON and all individuals similarly situated, Plaintiffs,
>
> v.

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[1] Class certification is not discussed because all complaints will be dismissed unless cause to the contrary can be shown, as set forth below.

MARIO CUOMO, Governor of the State of New York and THOMAS COUGHLIN, Commissioner of New York State Department of Correction Services, Defendants.

93 Civ 6839 (VLB)

All future filings should include this caption and case number.

Plaintiffs allege that New York Election Law § 5-106(2), which prohibits incarcerated felons from voting in federal, state, and local elections unconstitutionally discriminates against Blacks and Hispanics, who allegedly comprise 87% of the total prison population and 25% of the population of New York State.

II

The case raises profound issues, but these have already been examined by the judiciary with uniform negative outcomes. If a different approach is to be taken, it would be more appropriate for such a step to be initiated by the higher courts rather than at the trial level. Unless this is to be done, appointment of counsel at the district court level or awaiting responses by the defendants would consume resources with little likelihood of benefit to plaintiffs or the public.

Because of the possibility that an appellate court may choose to appoint counsel at the appellate level or to grant relief, it may be useful to consider the variety of options which might be available were the existing rule to be re-examined.

The preponderance of minority groups in our prisons is a subject of profound concern. The ability of the judiciary to confront the underlying reasons for this phenomenon is limited.[2]

Under our system of justice, governed by if not always attaining due process and providing numerous safeguards to

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[2] See *Toliver v. Sullivan Diagnostic Center*, 812 F. Supp. 411 (S.D.N.Y. 1993).

defendants, political empowerment of those convicted of crime cannot necessarily be assumed to be in the interest of citizens who are members of minority communities. The Equal Protection Clause and the federal Voting Rights Act seek to protect such citizens.[3] The victims of crime are also predominantly members of minority groups, as eloquently pointed out by Representative Charles Rangel and former Manhattan Borough President William Sutton.[4]

Permitting prisoners to vote in local elections might swamp local electorates, depriving innocent citizens of the opportunity to guide the destiny of their municipalities or obtain representation at the county or state level. The resultant practical disenfranchisement of local residents would itself be unjustifiably discriminatory.[5] Moreover, local services in such political subdivisions are also usually separate from those provided in prisons, in regard to which prisoner franchise would be of greatest significance if local prisoner representation were to be required.

Prisoner voting at the statewide level or at the former residence of a prisoner is permitted in some states (see part IV below). An appellate court has not yet, but might, determine that there is no sufficient reason for denying the franchise at that level to prisoners.

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[3] For historic roots of judicial concern relating to adequacy of political representation for all groups of citizens, see *United States v. Carolene Products Co*, 304 U.S. 144, 152-53 n. 4, 58 S.Ct. 778, 783-84 n. 4, 82 L.Ed. 1234 (1938).

[4] See *Stewart v. United States*, 817 F.Supp. 12 (S.D.N.Y. 1993).

[5] One can readily imagine the effect on a locality of a majority of voters consisting of prisoners electing a mayor who appointed a police commissioner chosen for acceptability to the constituency which put that mayor in office. The evils of faction foreseen in The Federalist No 10 (Madison) might well be significant, with impacts beyond the locality involved, and potentially indeed of national concern.

Placement of prison facilities carrying voting rights of the inmates into local communities would also make it difficult to obtain local acquiescence or cooperation. the "Not In My Backyard" ("NIMBY") objection would doubtless acquire additional notoriety.

Were this to occur, the result would be to avoid reducing the total weight of the minority vote in the states and in voting for members of the Electoral College, while likewise avoiding discriminatory adverse discrimination against local citizens with the misfortune to live in a political subdivision containing a prison. A ruling of this type, if made, might be based on the importance of voting rights and weakness of contrary imperatives at the statewide level, thus avoiding the need for complex and controversial resort to statistical analyses.

III

Voting is a fundamental political right, *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071, 30 L.Ed. 220 (1886). Disenfranchisement of felons under state law, however, has been consistently upheld. *Richardson v. Ramirez*, 418 U.S. 24, 53, 94 S.Ct. 2655, 2670 , 41 L.Ed.2d 551 (1974); *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir.), *cert. denied*, 464 U.S. 963, 104 S.Ct. 400, 78 L.Ed.2d 341 (1983); *Green v. Board of Elections of City of New York*, 380 F.2d 445, 451 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048, 88 S.Ct. 768, 19 L.Ed.2d 840 (1968).[6]

Section 2 of the Fourteenth Amendment provides that representation of a state in the House of Representatives and Electoral College may be reduced "when the right to vote at any election . . . is denied . . . or in any way abridged, *except for participation in rebellion, or other crime*" (emphasis supplied).

The Voting Rights Act, 42 U.S.C. § 1973(a) ("Voting Rights Act"), protects an individual's right to vote by prohibiting states from creating voter qualifications that result in discrimination based on race or color. This entails avoidance of vote dilution, which may occur when voting arrangements prevent effective use of the franchise. *See White v. Regester*,

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[6] Even the ability of states to disenfranchise ex-felons who have completed their sentence and parole has been upheld. *Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974); *see Price v. Johnston*, 334 U.S. 266, 68 S.Ct. 1049, 92 L.ED. 1356 (1948).

412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *Wesley v. Collins*, 605 F.Supp. 802 (M.D.Tenn. 1985), *aff'd* 791 F.2d 1255 (6th Cir. 1986). The Voting Rights Act does not guarantee minority groups proportional representation but does guarantee everyone an opportunity equal to that of others to obtain representation. *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021, 106 S.Ct. 3335, 92 L.Ed.2d 740 (1986).

The legislative history of the Voting Rights Act, see S.Rep.No. 97-417, 97th Cong., 2d Sess. 27, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 205 (hereinafter "Senate Report"), lists numerous factors to be considered by a court in weighing the totality of the circumstances analysis to determine if challenged election procedures violates the Act. *See White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976); *Wesley v. Collins*, 791 F.2d 1255, 1260 n. 5 (6th Cir. 1986). Such factors are "neither exclusive nor controlling", and "the 'totality of the circumstances' analysis requires a highly individualistic inquiry." *Wesley*, 791 F.2d at 1260.

Disproportionate racial impact of felon disenfranchisement on a minority voting population does not establish a violation of the Voting Rights Act absent other reasons to find discrimination. *Id.* at 1261. In concluding that a Tennessee statute which disenfranchised felons did not violate the Voting Rights Act, the court in *Wesley* held that disproportionate impact "does not 'result' from the state's qualification of the right to vote on account of race or color," *id.* at 1262, but rather, "felons [are] disenfranchised because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment." *Id.*[7]

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[7] The court also distinguished the Tennessee statute from the statute that was invalidated in *Hunter v. Underwood*, 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985). In *Underwood*, a provision of the Alabama constitution which disenfranchised those convicted of crimes of "moral turpitude" was invalidated as overly broad, and because it was enacted with the intent to discriminate against blacks.

IV

Some states grant incarcerated felons the right to vote but the vast majority of states do not. This is pertinent although not controlling. Massachusetts allows incarcerated felons to vote in statewide elections, a fundamental right guaranteed by the state constitution,[8] and on the legal theory that incarcerated persons have the capacity to acquire domicile in Massachusetts.[9] *See Dane v. Bd. of Registrars of Voters*, 374 Mass. 152, 371 N.E.2d 1358 (1978). The court in *Dane* noted that the majority of states, including New York, do not allow felons to acquire domicile for purposes of voting. *See Urbano v. News Syndicate Co.*, 232 F.Supp. 237, 239 n. 1 (S.D.N.Y. 1964), *rev'd on other grounds*, 358 F.2d 145 (2d Cir.), *cert. denied*, 385 U.S. 831, 87 S.Ct. 68, 17 L.Ed.2d 66 (1966). Under Vermont law, for example, "[n]otwithstanding any other provision of law," a convicted criminal retains the right to vote by absentee ballot at the last voluntary residence, but may not acquire residence at the location of incarceration. 28 Vt.Stat.Ann. § 807.

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[8] Unlike New York, Massachusetts has a constitutional provision which renders voting an "essential and unalienable right". Const., Commonwealth of Mass., Pt. 1, Art. 1. In Massachusetts, "the right to vote is a fundamental personal and political right. The equal right of all qualified to elect officers is one of the securities of the Declaration of Rights, Arts. 1-9." *Attorney General v. Suffolk County Apportionment Comm'rs*, 224 Mass. 598, 601, 113 N.E. 581 (1916). The basic constitutional qualifications are codified in Mass. Gen. Laws ch. 51 § 1.

[9] In *Dane v. Bd. of Registrars of Voters*, 374 Mass. 152, 371 N.E.2d 1358 (1978), an unsuccessful challenge by a registered voter to the voting rights of inmates of a prison, the court identified a rebuttable presumption that inmates have retained their former domicile for voting purposes. Mass. Gen. Law ch. 51 § 49 places the burden on prisoners to rebut this presumption by showing that they have formed the requisite intent to make the location of their incarceration their domicile. *Id.*

V

Plaintiffs assert that disenfranchisement for crime amounts to taxation without representation. This argument has been rejected by the Ninth Circuit in an unpublished opinion, which, because of Ninth Circuit Rule 36-3, I do not cite as precedent but the reasoning of which is persuasive on its merits; no other cases dealing with this specific contention have been found. In *Gage v. Hawkins*, 919 F.2d 144 (9th Cir. 1990)(table), 1990 WL 186809, 1990 US App Lexis 20804, *cert denied* ___ U.S. __, 111 S.Ct. 1688, 114 L.Ed.2d 83 (1991), the court denied a prisoner's claim of the right to register to vote or, in the alternative, to the return to him of all taxes paid during his imprisonment.

VI

Plaintiffs have requested appointment of counsel. Under 28 U.S.C. § 1915(d), a district court may exercise discretion in deciding whether counsel should be appointed for an indigent incarcerated litigant. *Cooper v. A. Sargenti Co.*, 877 F.2d 170-172 (2d Cir. 1989); *Jenkins v. Chemical Bank*, 721 F.2d 876, 879 (2d Cir. 1983). The court must first determine whether the litigant's claim meets a threshold showing of merit. *Hodge v. Police Officers*, 802 F.2d 58, 61-62 (2d Cir. 1986). Only if the litigant's position is likely to be of substance does the court then consider the plaintiff's ability to obtain representation, the ability to handle the case without assistance in light of the required factual investigation, the complexity of the legal issues, and the need for expertly conducted cross-examination to test veracity. *Cooper*, 877 F.2d at 172.

The merits of the indigent's claim is the primary factor in determining whether to appoint counsel. *Id.* at 170-72; *Hodge v. Police Officers*, 802 F.2d 58, 61-62 (2d Cir. 1986). Even if the claim is not frivolous, if the chances of succeeding on the merits are only slight, counsel may be denied because volunteer attorney time is a scarce commodity which must be allocated judiciously. "[E]very assignment of a volunteer

lawyer to an undeserving client deprives society of a volunteer lawyer available for a deserving cause. We cannot afford that waste." *Cooper*, 877 F.2d at 172.

Because of the lack of probability of success, appointment of counsel is denied.

VII

Plaintiffs may within 45 (forty-five) days of the date of this memorandum order respond to the considerations outlined above. Unless persuasive reasons not to do so are submitted, the complaints will then be dismissed for failure to state claims on which relief may be granted. This action will in that event be taken, on notice, under Fed.R.Civ.P. 1 and 12, rather than under 28 U.S.C. § 1915(d) relating to frivolous *in forma pauperis* complaints. See generally *Denton v. Hernandez*, ___ U.S. ___, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992); *Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). Defendants' time to answer or move is tolled pending action to be taken after the expiration of the 45-day period.

SO ORDERED

Dated: White Plains, New York
December 22, 1993

Vincent L. Broderick

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment XIV

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives - Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. Disqualification to hold office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a mem-

ber of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, removes such disability.

Sec. 4. Public debt not to be questioned - Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provision of this article.

42 U.S.C. § 1973 Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS § 1973(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by

members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

New York State Election Law

§ 5-106. Qualifications of voters; reasons for exclusion

1. No person who shall receive, accept, or offer to receive, or pay, offer or promise to pay, contribute, offer or promise to contribute to another, to be paid or used, any money or any other valuable thing as a compensation or reward for the giving or withholding a vote at an election, or for registering or refraining from registering as a voter, or who shall make any promise to influence the giving or withholding of any such vote or registration, or who shall make or become directly or indirectly interested in any bet or wager depending upon the result of an election, shall vote at such election.

2. No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole. The governor, however, may attach as a condition to any such pardon a provision that any such person shall not have the right of suffrage until it shall have been separately restored to him.

3. No person who has been convicted in a federal court, of a felony, or a crime or offense which would constitute a felony under the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the president

of the United States, or his maximum sentence of imprisonment has expired, or he has been discharged from parole.

4. No person who has been convicted in another state for a crime or offense which would constitute a felony under the laws of this state shall have the right to register for or vote at any election in this state unless he shall have been pardoned or restored to the rights of citizenship by the governor or other appropriate authority of such other state, or his maximum sentence has expired, or he has been discharged from parole.

5. The provisions of subdivision two, three and four of this section shall not apply if the person so convicted is not sentenced to either death or imprisonment, or if the execution of a sentence of imprisonment is suspended.